



Atty Gen. Op. No. 11 - JTB.11

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August 17, 2011

Ms. Anna Legates
12 West Street
Dewey Beach, DE 19971

**RE: Freedom of Information Act Complaint Against
Town of Dewey Beach**

Dear Ms. Legates:

On or about May 12, 2011, you asked for an Attorney General's determination as to whether the Town of Dewey Beach ("Town") committed approximately 35 violations of the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"). The violations you allege can be grouped as follows:

- (1) Whether agenda items were sufficient to inform the public of the issues to be discussed.
- (2) Whether the Town improperly removed Item 2 from the December 11, 2010 Town Meeting agenda.
- (3) Whether the Town failed to timely prepare minutes of its meetings.
- (4) Whether the various meeting minutes adequately reflect the relevant discussions.
- (5) Whether the Town held an improper private meeting on December 11, 2010.
- (6) Whether the Town failed to properly notice a December 4, 2010 Special Meeting.

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Because of the number of violations and the size of your petition (approximately 150 pages), the Town was given additional time in which to respond. The Town made a timely response on July 27, 2011, and this is the Delaware Department of Justice's determination pursuant to 29 *Del. C.* § 10005(e).

RELEVANT STATUTES

Section 10004(e)(2) of FOIA provides the criteria for proper notice of meetings and preparation of agendas:

All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings, including whether such meeting will be conducted by video-conferencing; however, the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body's meeting.

Section 10002(a) defines "agenda" as, "a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor [sic] under subsection (b) of § 10004 of this title."

Section 10004(e)(3) establishes the requirements for public notice:

All public bodies shall give public notice of the type set forth in paragraph (2) of this subsection of any special or rescheduled meeting as soon as reasonably possible, but in any event no later than 24 hours before such meeting. A special or rescheduled meeting shall be defined as one to be held less than 7 days after the scheduling decision is made. The public notice of a special or rescheduled meeting shall include an explanation as to why the notice required by paragraph (1) of this subsection could not be given.

And Section 10004(f) addresses minutes and public records:

Each public body shall maintain minutes of all meetings Such minutes shall include a record of those members present and a record, by individual members

(except where the public body is a town assembly where all citizens are entitled to vote), of each vote taken and action agreed upon.

DISCUSSION

I. AGENDAS.

A. The contested agenda items each sufficiently informed the public of the issues scheduled for action or discussion.

The Complainant alleges that at least six separate Town agendas contained at least nine

FOIA violations:

- (1) November 6, 2010 – Item 4: Discuss and possibly vote on approval of change order from ECI for Bayard Avenue Project.
- (2) November 6, 2010 – Item 5: Discuss and vote on award construction of bid for Bayard project.
- (3) December 4, 2010 – Item 1 (Work Session): Bayard Avenue Funding
- (4) December 4, 2010 – Item 1 (Special Meeting): Discuss and possibly vote on moving forward with Bayard Avenue Project prior to December 15, 2010.
- (5) December 11, 2011 – Item 2: Discussion regarding Bayard Avenue funding and possibly vote on moving forward prior to State loan approval as well as project update.
- (6) January 8, 2011 – Item 4: Discuss and possible [sic] vote on item(s) regarding potential additional revenue sources for Dewey Beach
- (7) January 8, 2011 – Item 5: Discussion and possible vote regarding Bayard Avenue project funding.
- (8) March 12, 2011 – Item 1: Discuss and vote to authorize the submission of an amendment to Section 26 of the Town Charter concerning the process for borrowing money and issuance of bonds and changing date to present budget to council each fiscal year.
- (9) March 12, 2011 – Item 2: Discuss and possibly vote on authorizing the use of monies from Roads & Maintenance account and General Fund to

pay invoices for Bayard project until funds can be reimbursed through DNREC loan.

You cite *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at *5 (Del. Ch.), to support your complaint that these agenda items were "broad generalities [that] fail[ed] to draw the public's attention to the fact that specific important issue[s] [would] be treated." FOIA requires only that an agenda include "a general statement of the major issues expected to be discussed at a public meeting," 29 Del. C. § 10002(a), not extensive, detailed accounts of each topic. See *Att'y Gen. Op. 10-IB12*, 2010 WL 4154564 (Del. A.G.). In *Ianni*, the Court held that the agenda topic "primary election" did not alert the public that the Board of Elections would consider a proposal to consolidate election districts for purposes of a primary election. However, "all that would have been required to satisfy [FOIA] would have been a statement that 'election district consolidation' or 'location of polling places' was to be treated." *Ianni*, at *5. "[T]he point of the agenda is to put the public on notice, not to answer every question about the agenda item." *Att'y Gen. Op. 10-IB12*, 2010 WL 4154564, at *1. The agenda items you challenge informed the public as to what the Town intended to discuss, so that the public could decide whether to attend the meeting. See *Att'y Gen. Op. 05-IB11*, 2005 WL 1209241. The agenda items were sufficient under FOIA.

B. Removing agenda items.

You contend the Town violated FOIA by removing Item 4 from the December 11, 2010 Town Meeting agenda without "stat[ing] a compelling reason" FOIA expressly provides that a public body may remove items from an agenda. 29 Del. C. §10004(e)(2). FOIA does not

require that the Town offer a reason, let alone a "compelling reason," for removing an agenda item. The Town did not violate FOIA by removing an item from a Town Meeting agenda.

II. MINUTES.

A. Timely preparation of Minutes.

You complain that the following approvals of minutes were not timely:

- (1) The September 11, 2010, October 09, 2010, and November 6, 2010 minutes were not approved until the December 11, 2010 Town Meeting.
- (2) The January 08, 2011 minutes were not approved until the March 12, 2011 Town Meeting.
- (3) The December 4, 2010 and March 26, 2011 minutes were not approved until the May 14, 2011 Town Meeting.

Although "FOIA does not set a time limit for a public body to prepare minutes of its meetings," "a reasonable time is by the time of the public body's next regularly scheduled meeting." *Att'y Gen. Op. 06-IB02*, 2006 WL 1242011, at * 2 (Del. A.G.). The Town concedes that the above-mentioned minutes were not prepared by the next regularly scheduled meeting. However, we have recognized that "personnel absences" might delay the minutes. *Id.* According to the Town, in January and February, 2011, alone, the Town Commissioners held seven meetings. Then, in March, 2011, the employee responsible for preparing the minutes left his employment. However, the Town understands "the preparation of timely minutes 'is not a technical detail,'" *Id.*, and it will work towards ensuring that future minutes are prepared and presented to Council by the next regularly scheduled meeting. As to remediation, where, as here, there is no evidence that the delays in presenting minutes were intentional (and the Town

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promptly makes recordings of the meetings available on its website) and the minutes have already been prepared and approved, remediation is unnecessary.

Finally, without providing a specific instance in which you were denied access to records, you claim that the Town failed to make the minutes of multiple Long Term Revenue Planning Ad Hoc Committee meetings available to the public. The Town represents that these minutes, however, are on file with the Town and available for public inspection.

B. Complete Minutes.

You have alleged a number of violations based on the minutes not adequately and specifically summarizing the subjects discussed during several public meetings. FOIA does not require that the Town transcribe the entire public discussion in the meeting minutes:

FOIA does not require any specific form for the minutes a public body must prepare and maintain for every meeting. The Act requires that certain information be included in the minutes, but neither says that the subjects discussed must be summarized nor attempts to define how specific such a summary should be.' *Common Cause of Delaware v. Red Clay Consolidated School District*, C.A. No. 13798, 1995 WL 733401, at p.4 (Del. Ch., Dec. 5, 1995) (Balick, V.C.). There is no clearly implied statutory requirement to summarize the subjects discussed with any degree of specificity' in the minutes FOIA requires to be prepared and maintained. FOIA only requires the minutes to include: a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon. 29 Delaware Code §10004(f).

Att'y Gen. Op. 05-IB06, 2006 WL 840259, at * 3 (Del.A.G.). Section 10004(f) only requires that meeting minutes include "a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon." The allegedly deficient minutes meet this express statutory requirement.

You further maintain that a public body must attach related public records to the minutes. Yet, FOIA contains no such requirement. The Town does, however, concede that it

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inadvertently failed to identify Commissioner Solloway as "present" in the minutes for the December 04, 2011 meeting. The Town has directed that the minutes be corrected, and it intends to present the amended minutes to Council for approval during the August Town Council meeting, thereby remedying any FOIA violation.

III. PUBLIC ACCESS TO MEETINGS.

You allege that after the regularly scheduled Town Council meeting on December 11, 2011, the Town held an improper private meeting to discuss Town business. A "meeting" is "the formal or informal gathering of a *quorum* of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing." 29 *Del. C. § 10002(b)* (emphasis added). FOIA, therefore, does not apply to meetings of a sub-quorum of members. According to the Town, two Town Commissioners met with representatives from the Civic League, Citizens to Preserve Dewey, and the Town's Planning and Zoning Commission after the December 11, 2011 meeting to speak about a legal settlement, which had been made public during the December 11, 2011 Town Council meeting. Because less than a quorum of the Town Council met with the representatives, FOIA does not apply to that meeting. No improper private meeting was held on December 11, 2010.

IV. SPECIAL MEETINGS.

While you contend that the Town violated FOIA by failing to provide a proper explanation before holding a Special Town Meeting, FOIA does not require any explanation for holding a special meeting. The only requirement for a special meeting is that it be noticed to the public "as soon as reasonably possible, but in any event no later than 24 hours before such meeting." 29 *Del. C. § 10004(e)(3)*. If a special meeting is noticed less than 7 days in advance,

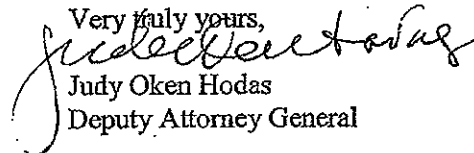
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the notice must explain the reason for the short notice. *Id.* FOIA does not require the notice to explain why a special meeting is necessary. The Town properly noticed a December 4, 2010 Special Meeting.

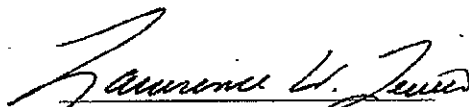
CONCLUSION

For the reasons stated above, we conclude that the Town's only violation was failing to timely prepare minutes of a number of meetings. However, because the Town did not intentionally fail to prepare minutes, and as the minutes in question already have been presented and approved, no remediation is necessary.

Very truly yours,


Judy Oken Hodas
Deputy Attorney General

APPROVED


Lawrence W. Lewis
State Solicitor

cc: Glenn C. Mandalas, Esquire